SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-828

ALVIN BENTON CELCER,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, ALVIN BENTON CELCER, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on September 5, 1974 and on December 5, 1974.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pages 17-22) has not been reported at this time.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition for certiorari was filed less than 30 days after the Court of Appeals denied the petition for rehearing filed by the petitioner (Appendix B, *infra*, pages 23-24).

QUESTIONS PRESENTED

1. Whether a conviction for conspiracy to transport a stolen boat in interstate commerce (a violation of 18 U.S.C. §§ 371 and 2314) can be had without proof of the defendant's knowledge that the boat was stolen.

2. Whether the prosecution's interrogation of a government witness eliciting a claim of the Fifth Amendment privilege coupled with the prosecutor's reference during jury argument to the witness' claim of privilege violated the defendant's rights to confrontation and due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

STATEMENT

On May 25, 1971 a 28 foot Slickcraft boat and a Moody boat trailer were taken from the Leisure Hours boatshop of Addision, Texas, by M.L. Vanaman, E.R. English and G.R. Slagle [Tr.[1] 23-25, 49]. The boat was then delivered by English and Slagle to the petitioner in Utah with the use of the petitioner's truck [Tr. 196-98, 240-42]. Within a week after the petitioner took delivery of the boat he registered the boat and trailer in Utah in his name [Tr. 105-10, 247-48] and gave Ewing $8,500 of the $16,500 he agreed to pay for the $23,502.80 boat [Tr. 23-25, 244]. After making numerous improvements on the boat [Tr. 249-51], in August 1971 the petitioner traded the boat trailer and other valuable consideration to James Cullen for a B-23 bomber with spare parts [Tr. 123-28, 252-55]. The boat was seized by FBI agents in the spring of 1972 in Cullen's possession [Tr. 136-37, 149].

FACTS RELEVANT TO THE SUFFICIENCY OF THE EVIDENCE QUESTION

Prior to the theft of the boat the petitioner accompanied Vanaman and Ewing to see the boat at Leisure Hours. Ewing and Vanaman negotiated with a representative of Leisure Hours for the purchase of the boat but reached no agreement. The petitioner did not participate in that conversation [Tr. 72-74]. On cross-examination of Vanaman the following occurred:

---

[1] "Tr." refers to the transcript of the trial proceedings in this case. The numbers following such references refer to the court reporter's pagination of the transcript.

> Q. (By petitioner's counsel) All right. At that time there was no discussion in Al Celcer's presence about stealing the boat, that boat or any boat?
>
> A. (By Vanaman) No, sir. [Tr. 76].

No evidence was adduced concerning any other discussion involving the petitioner which established his knowledge that the boat was stolen.

FACTS RELEVANT TO THE CLAIM OF PRIVILEGE QUESTION

J.D. Birdwell, who was named in the indictment as a co-conspirator but not as a defendant, was called as a witness by the government. In an effort to establish that Birdwell saw either Ewing or the petitioner change the boat's identification number, the government asked a series of questions relating to what Birdwell saw either Ewing or the petitioner do in the area of the boat where the identification number was located. To the questions Birdwell invoked his Fifth Amendment privilege against compulsory self-incrimination [Tr. 223-25].

During the jury arguments the prosecutor reminded the jury of this incident in the following manner:

> But I think you know when a man is trying to take care of himself what he does. You saw Mr. Birdwell. Mr. Ewing is not here at all. You take the Fifth, you don't testify. [Tr. 306].

REASONS FOR GRANTING THE WRIT

I.

The first question presented raises an issue regarding the proof necessary to establish the intent and knowledge of one charged with a violation of 18 U.S.C. § 371.[2] The crux of the issue is whether a broad application of the "slight evidence" rule, as the Court of Appeals applied the rule in this case, comports with the holdings in Ingram v. United States, 360 U.S. 672 (1959) and Direct Sales Co. v. United States, 319 U.S. 703 (1943).

Knowledge that a conspiracy exists is a requirement for establishing the requisite intent to support a conviction under 18 U.S.C. § 371. "(T)o establish the intent, the evidence of knowledge must be clear, not equivocal." *Direct Sales Co.* at 711. But because direct proof of knowledge of the conspiracy is rarely possible due to the nature of the offense, courts have repeatedly said that proof of knowledge can be effected by circumstantial evidence. An

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[2] 18 U.S.C. § 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

offshoot of this has been the adoption of the "slight evidence" rule[3] which is stated in United States v. Morado, 454 F.2d 167, at 175 (5th Cir. 1972), thusly: "the government need only show 'slight evidence' that a particular person was a member of a conspiracy once the conspiracy itself is established."

The Court of Appeals concluded that because the petitioner furnished the trucks used to transport the stolen boat from Texas to Utah and because he took delivery of the boat and later traded it for other property, the slight evidence rule applied to establish his knowing participation in the conspiracy.[4] Because the broad application of the slight evidence rule by the Court of Appeals in the petitioner's case failed to include as a part of the test any requirement that the slight evidence relied upon must establish the petitioner's knowledge of the substantive offense, application of the rule violated the holding in *Ingram* and conflicts with decisions of other circuits which properly apply the slight evidence rule consistent with *Ingram*.

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[3] United States v. Pardo-Bolland, 348 F.2d 316 (2nd Cir. 1965); United States v. Kenney, 462 F.2d 1205 (3rd Cir. 1972); United States v. Morado, 454 F.2d 167 (5th Cir. 1972); United States v. Chambers, 382 F.2d 910 (6th Cir. 1967); United States v. Langel, 451 F.2d 957 (8th Cir. 1971); United States v. Knight, 416 F.2d 1181 (9th Cir. 1969). *Contra* United States v. Birmingham, 454 F.2d 706 (10th Cir. 1971).

[4] The Court of Appeals erroneously concluded on original submission that the petitioner was a party to a discussion wherein the proposed theft of the boat was discussed. That the petitioner was not a party to such a discussion is clearly shown by the quoted cross-examination of Vanaman at page 4, *supra*. This was pointed out to the Court of Appeals on original submission and on rehearing.

In *Ingram* this Court said:

> It is fundamental that a conviction for conspiracy under 18 U.S.C. § 371 cannot be sustained unless there is "proof of an agreement to commit an offense against the United States." Pereira v. United States, 347 U.S. 1. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. "Without the knowledge, the intent cannot exist." Direct Sales Co. v. United States, 319 U.S. 703, 711.
>
> "[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." [Footnote omitted].

360 U.S. at 677-78.

The substantive offense which the petitioner was accused of conspiring to commit was the transportation in interstate commerce of a boat of the value of $5000 or more, knowing the same to have been stolen. Knowledge that the boat was stolen is an essential ingredient of the offense. United States v. Boone, 470 F.2d 908 (4th Cir. 1972); United States v. Reed, 414 F.2d 435 (5th Cir. 1969); Loman v. United States, 243 F.2d 327 (8th Cir. 1957); United States v. Gardner, 171 F.2d 753 (7th Cir. 1948). To establish the petitioner's guilt of a conspiracy to transport the stolen boat, as charged in the indictment, it was incumbent upon the government to establish that the petitioner had "*at least* the degree of criminal intent necessary for the substantive offense itself", to-wit: knowledge that the boat was stolen.

The record is devoid of any direct evidence showing that the petitioner knew the boat was stolen. It was not shown that the petitioner participated in, planned or even knew of the theft of the boat. The petitioner's explanation that he purchased the boat from Ewing for a realistic sum negated any inference arising from his possession of the boat shortly after its theft.[5] Compare United States v. Infanti, 474 F.2d 522 (2nd Cir. 1973); United States v. McCoy, 472 F.2d 704 (4th Cir. 1973), cert. den., 412 U.S. 921 (1973). The government's evidence placing the petitioner in possession of the stolen boat, including the evidence that he aided in delivery of the boat from Texas to Utah, are "colorless as to the vital issue of knowledge" on the petitioner's part that the boat was stolen.

The "slight evidence" upon which the petitioner's conviction hangs does not satisfy the minimal standards laid down in *Ingram* and *Direct Sales Co.*. That application of the "slight evidence" rule must be consistent with *Ingram* and *Direct Sales Co.* and that the slight evidence relied upon must reasonably infer "the degree of criminal intent necessary for the substantive offense itself" has been recognized by other courts of appeals. United States v. Freeman, 498 F.2d 569 (2nd Cir. 1974) – slight evidence that the accused was a participant in the plan to import cocaine would have been sufficient, but evidence only that he knew of plan after the cocaine had been imported was insufficient; United States v. Galardi, 476 F.2d 1072 (9th Cir. 1973) – convictions of conspiring to commit an offense cannot be sustained where the accused could not have been convicted of

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[5] The petitioner's registration of the boat in his name, his subsequent open possession and use of it, and his open trading of the boat also belie any inference that he knew the boat was stolen.

the substantive offense under the evidence shown; United States v. DeNoia, 451 F.2d 979 (2nd Cir. 1971) – evidence that the accused delivered heroin at a co-defendant's instruction was not sufficient to establish his participation in the co-defendant's prior acts involving distribution of narcotics; United States v. Gallishaw, 428 F.2d 760 (2nd Cir. 1970) – to convict the accused of conspiring to rob a bank the government "would have had to show at a minimum that he knew that a bank was to be robbed", and absent such proof the slight evidence that the accused furnished a machine gun to the robbers without knowing their intention is insufficient; Miller v. United States, 382 F.2d 583 (9th Cir. 1967) – evidence that accused associated with alleged co-conspirator when the latter was making narcotics deliveries was insufficient to show the accused's knowledge of the criminal activities taking place; United States v. Ford, 324 F.2d 950 (7th Cir. 1963) – evidence that the accused purchased jewelry which he knew was stolen was insufficient to establish his guilt as a conspirator to dispose of stolen property; Reiss v. United States, 324 F.2d 680 (1st Cir. 1963) – a number of the accused's "presumptively innocent actions" vis-a-vis alleged co-conspirators was insufficient to support guilt of a conspiracy because the acts failed to show knowledge of the substantive wrongdoing; Embree v. United States, 320 F.2d 666 (9th Cir. 1963) – evidence that the accused knew that 20 or 30 cases of whiskey were for sale shortly after their theft was insufficient to establish his knowledge of the purloined nature of the whiskey, a sine qua non to his conviction for conspiracy to sell goods stolen from interstate commerce; and see also Glover v. United States, 306 F.2d 594 (10th Cir. 1962). These decisions represent the logical blending of the "slight evidence" rule with the holdings in *Ingram* and *Direct Sales Co.* – that when the "slight evidence" rule is invoked the slight evidence relied upon be clear, not equivocal, in establishing

the accused's participation in the conspiracy with the degree of criminal intent necessary for the substantive offense itself.

The evidence upon which the petitioner's conviction hangs contains no reasonable inference that he had knowledge, prior to or after the theft of the boat, that the boat was stolen. His conduct in aiding in the transportation of the boat from Texas to Utah indicated only a common purpose with the alleged co-conspirators of transporting a boat. Neither that evidence nor any other evidence established or gave rise to a reasonable inference that the petitioner's participation in transporting the boat was done with knowledge that the boat was stolen. Accordingly, the petitioner's "knowing participation in the conspiracy" to transport the stolen boat was not established. The application of the "slight evidence" rule by the Court of Appeals, omitting the fundamental test for evidence showing the petitioner's degree of criminal intent necessary for the substantive offense involved, *i.e.*, knowledge that the boat was stolen, conflicts with the cited decisions of the other courts of appeals and with the express holdings of this Court in *Ingram* and *Direct Sales Co.*

The petition for certiorari should issue to establish the proper parameters for application of the "slight evidence" rule in conspiracy cases consistent with the principles announced in *Ingram* and *Direct Sales Co.*, and to establish a consistent application of the "slight evidence" rule among the Courts of Appeals.

II.

The second question presented raises a fundamental issue regarding the right of confrontation and cross-examination. The government called a witness and asked him a

series of questions aimed at establishing the petitioner's knowledge that the boat in question was stolen. The witness refused to answer all pertinent questions relying upon his Fifth Amendment privilege. Thereafter, during jury argument, the government urged the jury to consider the witness' refusals to answer the questions put to him.

It is beyond peradventure that an accused has the right to confront and cross-examine the witnesses whose testimony is used against him by the prosecution. Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965). In Namut v. United States, 373 U.S. 179 (1963), it was clearly suggested that in the circumstances of a given case inferences from a witness' refusal to answer might add critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudice the accused. *Id.*, at 187.[6] The petitioner's contention is grounded not only upon the government's elicitation of the privilege in response to crucial, damaging questions, but is predicated also upon the prosecutor's argument to the jury reminding them that the witness had 'taken the Fifth' in response to the prosecutor's pointed questions. It is the prosecutor's use during the jury argument of the witness' claim of privilege, coupled with the particular circumstances of this case, which gives rise to reversible error.

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[6] The Court concluded in *Namut* that "the few invocations of privilege" of which complaint was made were not of such significance in the trial that they constituted reversible error, especially in view of the lengthy nonprivileged testimony that they gave which was incriminating. The Court concluded that "the few claims of testimonial privilege were at most cumulative support for an inference already well established by the nonprivileged portion of the witness' testimony." 373 U.S. at 189.

In Griffin v. California, 380 U.S. 609 (1965), it was held that the Fifth Amendment "forbids . . . comment by the prosecution on the accused's silence . . . that such silence is evidence of guilt." *Id.*, at 615. May the silence of another in response to questions incriminating the accused be treated differently than the accused's silence? Hardly, if an accused is to be convicted, if at all, upon evidence and testimony presented by witnesses who are subject to cross-examination by the accused. The interplay of the claim of privilege and a reference to that claim after the close of evidence was considered by the Third Circuit Court of Appeals in United States ex rel. Fournier v. Pinto, 408 F.2d 539 (1969). It was concluded that the impropriety of the act of the prosecutor in questioning a witness in the presence of the jury and eliciting a claim of privilege was compounded by the trial court's reference in his charge to the witness' refusal to answer the questions put to him because the court's instructions "could have served no purpose but to renew, reinforce and sanction whatever prejudicial effect the episode may have had at the time of its occurrence." *Id.*, at 542. Although the prosecution's case against the accused was substantial, the error was held to be reversible because it affected the crucial issue of identification. See also Fletcher v. United States, 332 F.2d 724 (D.C. Cir. 1964).

In the instant case the government introduced no direct evidence that the petitioner had knowledge that the boat was stolen. The petitioner's guilty knowledge – the crucial disputed issue in the trial – thus rested solely on circumstantial evidence. When the prosecutor elicited the claim of privilege he was asking specific, pointed questions which, had they been answered affirmatively, would have supported the government's contention that the petitioner knew the boat was stolen. The prosecutor's question implied the

existence of facts showing that the petitioner altered the identification number of the boat's engine (or that it was altered by Ewing with the petitioner's knowledge). Thus, the questions to which the privilege was claimed were neither inconsequential nor cumulative of evidence otherwise developed during the trial, as was the situation in *Namut*. The reminder of the claim of privilege, coupled as it was with a reference to Ewing's failure to appear for the trial, compounded the error that occurred during Birdwell's examination by the prosecutor. It is not unfair to conclude that the jury inferred from Birdwell's claim of privilege the existence of the facts suggested in the prosecutor's questions and that they concluded therefrom that the petitioner had knowledge of the boat's theft. This is especially true because there was no other evidence in the record to establish the petitioner's guilty knowledge, a fact which the jury had to have found before they returned their guilty verdict. Stewart v. United States, 366 U.S. 1 (1961), teaches that the existence of prejudicial inferences flowing from proof of a claim of privilege is not harmless where the inferences go to the heart of the litigation. In this case, as in *Stewart*, the only inference which the jury could draw from the claim of privilege went to the only crucial element of the case which the government had not established by competent evidence – the petitioner's guilty knowledge. It is noteworthy that *Stewart* was reversed even though the claim of privilege "was not emphasized by any reference to it in the instructions to the jury." *Id.*, at 10. In this case the danger of the situation was increased by the prosecutor's argument which brought to the jury's attention Birdwell's failure to answer his questions. Under the reasoning of Griffin v. California, *supra*, the prosecutor's jury argument relating to the claim of privilege removes any doubt that the error might be harmless.

The Court of Appeals failed to address this issue stating only that the "claims of prosecutorial misconduct" were without merit. Appendix A, *infra*, 18. As stated above, the petitioner's claim was, on appeal, and is now grounded on the denial of his right to confrontation and the government's use in argument of improper inferences from a witness' claim of the Fifth Amendment privilege.

The petition for certiorari should be granted to review the petitioner's claim that he was denied due process of law because the government used against him, as crucial evidence, a co-conspirator's claim of the Fifth Amendment in a manner that deprived him of the right of confrontation.

CONCLUSION

For the reasons stated the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MELVYN CARSON BRUDER
CHARLES H. ERWIN
Counsel for Petitioner

APPENDIX A

OPINION OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES of America, Plaintiff-Appellee,

v.

Alvin Benton CELCER and George Russel Slagle, Defendants-Appellants.

No. 74–1631
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 5, 1974.

Defendants were convicted before the United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., of conspiracy to transport stolen goods in interstate commerce, and they appealed. The Court of Appeals held that evidence that one defendant discussed stealing boat with coconspirators, provided truck which was to be used to transport stolen boat and trailer from Texas to Utah, provided rental truck when his own truck broke down in Wyoming, took delivery of the stolen boat and trailer in Utah and then traded the boat, trailer, and truck to another for other items was sufficient to prove defendant's knowing participation in conspiracy, and that, prosecutor's argument indicating that second defendant might have called additional witnesses, even if improper, was harmless and did not deny a fair trial on theory that it constituted comment on defendant's failure to produce witnesses to corroborate his story.

Affirmed.

1. Conspiracy ⇐47(11)

Evidence that defendant had discussed stealing boat with coconspirators, provided truck that was to be used to trans-

* Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

port stolen boat and trailer from Texas to Utah, provided rental truck when his own truck broke down in Wyoming, took delivery of stolen boat and trailer in Utah and traded them and truck to another for other items was sufficient to prove defendant's knowing participation in conspiracy to transport stolen goods in interstate commerce. 18 U.S.C.A. §§ 371, 2314.

2. Criminal Law ⇐730(11)

Prosecutor's closing argument indicating that defendant might have called additional witnesses, even if improper, was harmless and did not deny defendant a fair trial on theory that it constituted improper comment on defendant's failure to produce witnesses to corroborate his story where argument did not state that defendant was under any duty to call additional witnesses and did not suggest existence of any witnesses who would have been available to defendant but not to the Government and jury was instructed that prosecution had burden of proof and that defendant had no burden or duty to call any witnesses or produce any evidence.

Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

Appellants Alvin Benton Celcer and George Russel Slagle were indicted, with co-defendants Earnest English and William Ewing, under 18 U.S.C. § 371, for conspiracy to transport stolen goods worth $5000 or more—a Slickcraft boat and boat trailer—in interstate commerce, knowing the goods to have been stolen, in violation of 18 U.S.C. § 2314. Martin Vanaman and Jerry Birdwell were named as unindicted co-conspirators. Appellants Celcer and Slagle and co-defendant English were tried before a jury November 26 and 27, 1973, and found

guilty. On this appeal Celcer seeks reversal on the grounds that: (1) the evidence was insufficient to establish his knowing participation in the conspiracy; (2) the prosecutor improperly elicited from co-conspirator Birdwell a claim of Fifth Amendment privilege and then argued that fact before the jury; and (3) the government improperly offered evidence of extraneous offenses allegedly committed by Celcer. Slagle argues that his conviction should be reversed because: (1) the prosecutor improperly commented on Slagle's failure to produce witnesses to corroborate his defense; and (2) the trial court failed to instruct the jury that there was no evidence that any witnesses were available to corroborate or refute Slagle's defense and that the jury should draw no inferences from Slagle's failure to produce such witnesses. We affirm.

[1] The government amply established Appellant Celcer's knowing participation in the conspiracy. Prior to the May 23, 1971, theft of the boat and trailer from Leisure Hours boat company in Addison, Texas, Celcer went with Vanaman and Ewing to see the boat. Vanaman testified that the three of them discussed stealing the boat, and that Celcer's pickup was to be used to deliver the boat to Salt Lake City, Utah. Celcer brought his pickup to Vanaman's garage; when the pickup broke down in Wyoming, Celcer provided a Ryder rent truck to carry the boat the rest of the way to Utah; he took delivery of the stolen boat and trailer from Slagle and English in Salt Lake City; and he traded the boat, trailer, and pickup to one James Cullen for a B-23 bomber and parts. Celcer concedes that the evidence introduced by the government, if believed by the jury, was sufficient to establish the existence of a conspiracy. Clearly Celcer's conduct was such that the jury could have believed beyond a reasonable doubt that Celcer shared a common purpose with the other conspirators. We conclude that the government provided far more than the "slight evidence" needed to prove Celcer's knowing participation in the conspiracy. *See* United States v. Morado, 5 Cir. 1972, 454 F.2d 167, 175, cert. denied, 406 U.S. 917, 92 S.Ct.

1767, 32 L.Ed.2d 116; United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 830, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58. We find no merit in Celcer's claims of prosecutorial misconduct.

[2] Appellant Slagle alleges that he was denied his right to a fair trial because the prosecutor improperly commented on Slagle's failure to produce witnesses to corroborate his story and because the district judge did not adequately remedy the harm. Slagle sets forth the objectionable portion of the Assistant United States Attorney's closing argument as follows:

> Don't you know if that boat, the size of it and in this condition, in the middle of the morning while you have got construction workers pounding on nails and whatever on that apartment there wouldn't have been one of them noticing that thing out there on the prairie, that they would bother to find out? They know where the apartment is they say now. They didn't bother to tell anybody about this apartment before. Now they know. They wouldn't have found out who the construction workers were, at least one and asked some people, do you remember seeing that big boat at 10:00 o'clock in the morning parked out there in the middle of a field? Think that wouldn't have drawn some attention? (Transcript, p. 310).

This statement does not suggest the existence of any witnesses who would be available to appellant but not to the government. Although it indicates that Slagle might have called additional witnesses, it does not state that he was under any duty to do so. A full reading of the closing argument reveals that the quoted paragraph was but a small part of a lengthy attack on the credibility of Slagle's defense.

Immediately after the objectionable comment was made the trial judge instructed the jury that "[t]he burden is on the

Government." And in its general charge to the jury the court stated:

> In a criminal prosecution the burden is wholly upon the government to prove beyond doubt every essential element of the offense alleged. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Under these circumstances we believe that any possible error was rendered harmless beyond a reasonable doubt. United States v. Clarke, 5 Cir. 1972, 468 F.2d 890; *cf.* Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

DENIAL OF
PETITION FOR REHEARING

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

December 5, 1974

TO ALL COUNSEL OF RECORD
No. 74-1631 U.S.A. v. CELCER

Dear Counsel:

This is to advise than an order has this day been entered denying the petition( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12 the petition( ) for rehearing *en banc* has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By ANNE G. PARENT /s/
Deputy Clerk

cc: Mr. Charles H. Erwin
Mr. Ronald Houdyshell
Messrs. R.H. Stephenson
W.E. Smith

*As to Alvin B. Celcer

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-828

ALVIN BENTON CELCER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to show his knowing participation in a conspiracy and that the prosecutor engaged in misconduct in interrogating one of the government's witnesses.

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner and two co-defendants were found guilty under a one-count indictment charging a conspiracy to transport stolen goods valued in excess of $5,000 in interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. 371 and 2314.[1] Petitioner was sentenced to a term of thirteen months' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A) and denied rehearing (Pet. App. B).

[1]Indicted with petitioner were George Russell Slagle, Earnest English and William Ewing. Two others, Martin Vanaman and Jerry Birdwell, were named as unindicted co-conspirators. Slagle and English were convicted with petitioner, Ewing was not tried for this offense, having been incarcerated at the time of trial for a series of other thefts. Slagle's conviction was affirmed along with petitioner's (Pet. App. A), but he has not sought further review.

In early May 1971, petitioner, co-defendant Ewing and co-conspirator Vanaman went to Leisure Hours boat company to examine a Slickcraft cruiser in which petitioner was interested (Tr. 41-42). They had previously discussed stealing the boat (Tr. 43), and they agreed that petitioner's pickup truck would be used to deliver the boat to him in Salt Lake City (Tr. 44, 49). Petitioner left his pickup at Vanaman's garage (Tr. 44), where co-defendant English fitted it for pulling the boat trailer to Salt Lake City (Tr. 44-46, 185). Petitioner was to pay $4,000 for the delivery of the boat, half each to Vanaman and English (Tr. 53). English arranged with co-defendant Slagle, who had a commercial driver's license (Tr. 188), to help deliver the boat to Salt Lake City (Tr. 63, 188). Vanaman and English discussed the route to Salt Lake City and Vanaman gave English petitioner's phone number there (Tr. 64).

Several weeks later, on May 23, 1971, Vanaman, English, and Slagle went to Leisure Hours, hitched the boat (on a trailer) to petitioner's truck, and drove it away, stopping shortly after leaving to put a Texas license tag on the boat trailer (Tr. 50). English and Slagle then drove on, taking the boat to petitioner in Salt Lake City (Tr. 51).

En route they had trouble with the pickup while in Wyoming and called petitioner, who sent a truck after it (Tr. 52, 196). Petitioner came in a rented truck to see them in Wyoming, and Slagle and English hauled the boat on to Salt Lake City (Tr. 197-198), where they delivered it to the residence of petitioner's sister (Tr. 173, 199). Petitioner then took English and Slagle to the airport and they flew back to Dallas (Tr. 211).

Petitioner obtained a Utah license for the boat trailer (Tr. 108-115), and agreed to trade the boat, trailer and pickup to James R. Cullen for a B-23 bomber and parts (Tr. 123). Petitioner signed the agreement and a promissory note for $2,100 (Govt. Ex. 7) and had the boat, trailer and pickup delivered to Cullen in San Diego, California (Tr. 129-132). Petitioner presented a bill of sale to Cullen (Govt. Ex. 12) falsely stating that he had paid Michael Woodin $24,500 for the boat (Tr. 135).[2]

D. A. Cody, the owner of Leisure Hours, testified that the same boat sold by petitioner to Cullen and recovered by the FBI in San Diego, California, in May 1972 (Tr. 151-161), was found to be missing from his boat yard on May 25, 1971, along with the trailer, and that the value of the boat and trailer was $23,502.80 (Tr. 21-30).

1. In an opinion on which we rely, the court of appeals correctly found that the evidence was sufficient to establish petitioner's knowing participation in a conspiracy to steal the boat. As the court stated (Pet. App. 17-18):

> The government amply established Appellant Celcer's knowing participation in the conspiracy. Prior to the May 23, 1971, theft of the boat and trailer from Leisure Hours boat company in Addison, Texas, Celcer went with Vanaman and Ewing to see the boat. Vanaman testified that the three of them discussed stealing the boat, and that Celcer's pickup was to be used to deliver the boat to Salt Lake City, Utah. Celcer brought his pickup to Vanaman's garage; when the pickup broke down in Wyoming, Celcer provided a Ryder rent truck to carry the boat the rest of the way to Utah; he took delivery of the stolen boat and trailer from Slagle and English

[2]Petitioner testified that he had purchased the boat from co-defendant Ewing for $8,500 cash, plus a note for $8,000 payable in two years at no interest (Tr. 244, 260).

> in Salt Lake City; and he traded the boat, trailer, and pickup to one James Cullen for a B-23 bomber and parts. Celcer concedes that the evidence introduced by the government, if believed by the jury, was sufficient to establish the existence of a conspiracy. Clearly Celcer's conduct was such that the jury could have believed beyond a reasonable doubt that Celcer shared a common purpose with the other conspirators. We conclude that the government provided far more than the "slight evidence" needed to prove Celcer's knowing participation in the conspiracy. See *United States* v. *Morado*, 5 Cir. 1972, 454 F.2d 167, 175, cert. denied, 406 U.S. 917 * * *; *United States* v. *Warner*, 5 Cir. 1971, 441 F.2d 821, 830, cert. denied, 404 U.S. 829 * * *.

Petitioner's contention (Pet. 6-10) that the court of appeals' decision conflicts with the decisions of this Court in *Ingram* v. *United States*, 360 U.S. 672, 677-681, and of various courts of appeals, is based on the assertion that the record does not show that petitioner, Vanaman and Ewing "discussed stealing the boat * * *," as the court of appeals stated. However, the portion of Vanaman's testimony relied on by petitioner (Pet. 4) shows only that petitioner was not present at a discussion about stealing the boat "that day" or "[a]t that time" when they were asking the boat company about the boat's price (Tr. 76). A discussion of the theft had already occurred to which petitioner was a party (Tr. 42-43). Petitioner does not object to the charge to the jury, and in reality merely disagrees with the jury's determination that he was aware that the boat was stolen.

2. Petitioner also contends that the prosecutor's question to a witness who invoked the Fifth Amendment privilege against self-incrimination constituted misconduct. During its case-in-chief, the government called Jerry Birdwell, an unindicted co-conspirator, as a witness. Birdwell testifed that he was with petitioner and Ewing at petitioner's sister's house in Salt Lake City. Birdwell said he was inside the boat with petitioner, but, when asked whether he saw either petitioner or Ewing doing anything in the engine area, refused to answer on self-incrimination grounds (Tr. 223-224). The trial court upheld the witness's invocation of the privilege and the government did not question him further. At petitioner's request, the court instructed the jury to disregard the government's line of questioning, and none of the defendants cross-examined Birdwell (Tr. 225).

Contrary to petitioner's assertion, this single question did not deny or limit petitioner's right to cross-examine Birdwell. Although petitioner chose not to cross-examine Birdwell, he was in no way inhibited or precluded from doing so.[3] There is also no reason to believe, as petitioner

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[3]Petitioner also contends that the prosecutor improperly referred to Birdwell's assertion of his Fifth Amendment privilege during closing argument, when he stated (Tr. 306):

> Gentlemen, I think it's interesting to note how each of the attorneys has come to you and tried to tell you that don't believe Marty Vanaman. He's a convict, and he is here taking care of himself. Don't believe him.
>
> But I think you know when a man is trying to take care of himself what he does. You saw Mr. Birdwell. * * * You take the Fifth, you don't testify.

The prosecutor's brief reference, aimed at the credibility of one of his own witnesses, is not analogous to the prosecutor's comment on an accused's failure to testify on his own behalf in *Griffin* v. *California*, 380 U.S. 609, on which petitioner relies. Moreover, petitioner neither objected nor requested a corrective instruction, thereby waiving any error.

suggests, that the jury inferred petitioner's guilt from the witness's invocation of the privilege in response to this single question in a lengthy trial.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[4]Petitioner does not claim that the jury was improperly instructed concerning the impermissibility of drawing inferences from a defendant's exercise of his Fifth Amendment rights, and it cannot be presumed that the jury drew improper inferences from Birdwell's invocation of his Fifth Amendment rights.